Montana Law Review

Volume 67
Issue 2 *Summer 2006*

Article 8

7-2006

Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

1. *CULBERTSON-FROID-BAINVILLE HEALTH CARE CORP. V. JP STEVENS & CO., INC.*[1]

In *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co., Inc.*, the Montana Supreme Court addressed the issue of the imposition of sanctions under Montana Rule of Civil Procedure 37 for a party's failure to meet discovery requests. The Supreme Court upheld sanctions imposed by the district court, including striking the defendant's defenses and entry of judgment for the plaintiff on the issue of liability. The Court also reviewed the lower court's calculation of damages stemming from the case.

In 1987, Roosevelt Medical Memorial Center and Nursing Home ("Roosevelt") purchased a roofing system from JP Stevens & Co., Inc. ("Stevens"). After inspecting the installation, Stevens issued Roosevelt a ten-year warranty on the roof.[2] In 1999, after experiencing problems with the roof, Roosevelt filed a complaint against Stevens asserting claims of negligence, product liability, breach of express warranty, and breach of implied warranties of merchantability and fitness for a particular purpose.[3] In its answer, Stevens denied having sold the roof to Roosevelt, denied liability and asserted several affirmative defenses to the claims.[4]

The case stagnated for three years until Roosevelt made its first discovery requests of Stevens in August of 2002.[5] On Janu-

1. 2005 MT 254, 329 Mont. 38, 122 P.3d 431.
2. *Id.* ¶ 3.
3. *Id.* ¶ 4.
4. *Id.*
5. *Id.*

ary 14, 2003, after twice continuing the trial date, the trial court ordered the parties to undergo mediation.[6] Roosevelt came to the mediation with several representatives who had full authority to settle the case, while Stevens showed up with one representative without authority to settle.[7] When the case failed to settle, Roosevelt petitioned the court for monetary sanctions in the amount of costs incurred in attending the mediation, which the trial judge imposed.[8]

Not long after the failed mediation, Roosevelt, having not received any discovery responses from Stevens, moved the trial court to compel Stevens to respond to these requests. Stevens' response to the twenty-eight requests consisted of two complete answers, three incomplete responses, references to documents already in Roosevelt's possession in response to two other requests, and objections to the remaining requests.[9] As a result of these responses, in an order dated March 19, 2003, the trial court ordered Stevens to fully comply with the requests within thirty days.[10] After receiving no response for nearly two months, Roosevelt moved the court to strike Stevens' defenses as a sanction for failing to comply with a discovery order pursuant to Montana Rule of Civil Procedure 37(b) on May 19, 2003.[11] Although Stevens had not formally requested additional time to respond, nor requested a protective order concerning the requests, it responded to Roosevelt's motion by claiming it was having trouble identifying and producing the materials requested.[12] After a hearing on this motion, the trial court issued an order striking Stevens' defenses and entered judgment for Roosevelt on the issue of liability based on Stevens' failure to answer discovery requests and for not providing a "reasonable excuse" for such failures.[13]

After entering the order, the trial court held a hearing to determine damages, at which Stevens presented no evidence nor called any witnesses to testify.[14] The trial court awarded Roosevelt the full cost it incurred in replacing the roof, plus consequential damages to cover prior costs of repairs and maintenance,

6. *Id.* ¶ 5.
7. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 5.
8. *Id.*
9. *Id.* ¶ 6.
10. *Id.* ¶ 7.
11. *Id.*
12. *Id.*
13. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 8.
14. *Id.* ¶ 9.

as well as compensation for the estimated damage to the interior of the hospital as a result of the faulty roof.[15] The total amount of damages awarded was $143,713.[16]

Stevens appealed this decision on two grounds: 1) abuse of discretion by the trial court for striking its defenses pursuant to Montana Rule of Civil Procedure 37(b) and entering judgment in favor of Roosevelt on the issue of liability, and 2) error in calculating the amount of damages awarded.[17]

On the issue of the trial court's order striking Stevens' defenses, the Montana Supreme Court first cited to Montana Rule of Civil Procedure 37(b), stating, "[i]f a party fails to obey an order to permit discovery, the district court may issue an order striking out pleadings or entering default judgment against the disobedient party."[18] The Court stressed that a trial judge is in the best position to know which parties disregarded the rules and also in the best position to determine which sanction is the most appropriate.[19]

To determine if the trial court's imposition of sanctions was proper, the Montana Supreme Court applied the three-part test from its holding in *Smith v. Butte-Silver Bow County*.[20] Under the *Smith* test, the court will consider whether the consequence by the sanction: 1) relates to the extent and nature of the actual discovery abuse; 2) relates to the extent of the prejudice to the opposing party that resulted from the discovery abuse; and 3) is consistent with the consequences expressly warned of by the district court, if a warning was actually issued.[21] In addition to these three factors, the court will also consider the party's disregard for the court's orders and authority.[22]

The Court noted that in its prior applications of the *Smith* test, there had been confusion over the application of the third prong of the test. The Court clarified its prior holdings by finding that the third prong requires only that the sanctions imposed be consistent with those of which the trial court expressly warned

15. *Id.*

16. *Id.* ¶ 1.

17. *Id.* ¶¶ 11, 22.

18. *Id.* ¶ 11 (citing MONT. R. CIV. P. 37(b)(2)(C)).

19. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 11 (citing Schuff v. A.T. Klemens & Son, 2000 MT 357, ¶ 69, 303 Mont. 274, ¶ 69, 16 P.3d 1002, ¶ 69).

20. *Id.* ¶ 14 (applying the holding of Smith v. Butte-Silver Bow County, 276 Mont. 329, 339-40, 916 P.2d 91, 97 (1996)).

21. *Id.*

22. *Id.* (citing McKenzie v. Scheeler, 285 Mont. 500, 516, 949 P.2d 1168, 1178 (1997)).

about.[23] The Court noted, therefore, that the third prong only applies if the trial court issued an express warning.[24]

In applying the first prong of the *Smith* test, the Court compared the facts in this case to those in *Smith* and *McKenzie v. Scheeler*. The Court found that Stevens' conduct was more like that of the plaintiff in *McKenzie* than the plaintiff in *Smith*.[25] Like in *McKenzie*, Stevens' unresponsiveness prevented Roosevelt from assessing the merits of its defenses and effectively challenging them and building an affirmative case by denying Roosevelt access to necessary information which was only available to Stevens.[26] The Court noted that Stevens' responses to the discovery requests were "evasive, woefully incomplete and tantamount to complete silence."[27] Further, the Court noted Stevens had provided "substantive" responses to only seven of Roosevelt's twenty-eight discovery requests, and only two of these responses were complete.[28] Also of note was Stevens' failure to respond in a timely fashion and the previous sanctions imposed on him for the failed mediation attempt.[29] The Court found the first prong had been satisfied based on its finding that, "[s]uch flagrant, complete and persistent disregard of the District Court's orders and Montana's Rules of Civil Procedure warrant the consequence eventually inflicted upon Stevens by the District Court."[30]

In its assessment of the second *Smith* prong, the Court found the sanctions imposed by the trial judge related to the extent of the prejudice suffered by Roosevelt.[31] The Court stated that "the discovery process was not merely halted; due to Stevens recalcitrance, it effectively never began."[32] As stated, Stevens' unresponsiveness prevented Roosevelt from assessing Stevens' defenses and building its own case-in-chief, forcing Roosevelt to incur large costs while working under a "cloud of uncertainty."[33]

The Supreme Court rejected Stevens' argument that Roosevelt must prove it had delayed the proceedings willfully by

23. *Id.* ¶ 15.
24. *Id.*
25. *Id.* ¶¶ 16-17.
26. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 17.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* ¶ 18.
32. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 18.
33. *Id.*

finding that, "it is the attitude of unresponsiveness to the judicial process, regardless of the intent behind that attitude, which warrants sanctions."[34] The Court took a strong stance against Stevens' stubbornness and unresponsiveness in finding that it did not meet the test for good faith compliance.[35] In doing so, the Court referenced Stevens' disregard for the rules of discovery and his refusal to acknowledge Roosevelt's discovery requests until the trial court ordered it to do so.[36]

The Court did not have to apply the third prong of the *Smith* test because there had been no explicit warning by the trial court concerning the consequences Stevens would face for non-compliance.[37] The Court found that Montana Rule of Civil Procedure Rule 37(b)(2) placed Stevens on notice of the possible consequences for non-compliance with discovery requests.[38] After making this determination, the Court upheld the imposition of sanctions made by the trial court based on Stevens' disregard of the court orders and authority.[39]

The Court did not offer much discussion regarding the challenge to the trial court's calculation of damages awarded to Roosevelt. The Court required Stevens to provide it with a transcript of the damages hearing in order to determine the merits of the appeal and whether to overturn the trial court's damage assessment.[40] Stevens failed to provide such a transcript, and therefore the Court was unable to determine what kind of deduction it should afford Stevens for Roosevelt's nine-year use of the roof because it had no evidence to justify such a deduction.[41] The Court also rejected Roosevelt's request for an award of attorney fees on appeal. The Court found that although Stevens did not provide the damages hearing transcript, it did have a meritorious appeal claim on the issue of the imposition of sanctions.[42]

The Court's decision in this case should serve as a stern warning to litigants and their attorneys that failing to adhere to the rules of compulsory discovery can result in serious ramifications.

34. *Id.* ¶ 19 (quoting Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, ¶ 24, 328 Mont. 232, ¶ 24, 119 P.3d 100, ¶ 24).
35. *Id.* ¶ 19.
36. *Id.*
37. *Id.* ¶ 20.
38. *Culbertson-Froid-Bainville Health Care Corp.*, ¶ 20.
39. *Id.* ¶ 21.
40. *Id.* ¶ 23.
41. *Id.*
42. *Id.* ¶ 24.

The Court does not tolerate parties who thumb their nose at court orders by failing to respond to discovery requests. As demonstrated by this case, the Montana Supreme Court is serious about upholding sanctions imposed by trial courts against litigants who purposefully disregard the compulsory discovery rules.

Brad J. Brown

2. *RICHARDSON V. STATE*[43]

The Preamble to the Montana Rules of Professional Conduct states, "[a] lawyer shall always pursue the truth." Although "truth" is an abstract concept incapable of ready definition, in the context of discovery it is best to pursue it lest liability arise.

Clarice Richardson attended a water aerobics class on the campus of the Montana College of Technology.[44] At the conclusion of the class, Richardson entered the women's locker room and fell on the smooth trowelled concrete floor, suffering a severe hip injury that required surgical reconstruction and months of rehabilitation.[45] Richardson filed suit against the State of Montana, which owns and operates the Montana College of Technology, alleging:

> 1) the State left the locker room floor in an unrepaired, unmarked, and dangerous condition, ignoring the high probability Richardson would be injured as a result;
> 2) the State knew of the danger prior to her fall, but failed to provide a warning or correct the danger;
> 3) Richardson slipped and fell as a result of the State's failure to correct the dangerous condition and provide adequate warning; and
> 4) Richardson suffered a severe injury because of her fall.[46]

Believing her discovery requests ought to possess some nexus with these allegations, Richardson formulated interrogatories and requests for production seeking information regarding other slip and fall accidents occurring at the water aerobic facility.[47] Additional requests sought seemingly pertinent information regarding any warnings provided by the State about the floor in "the area of Plaintiff's fall," any protective measures the State had undertaken to prevent slip and fall injuries in the area, and information con-

43. 2006 MT 43, 331 Mont. 231, 130 P.3d 634.
44. *Id.* ¶ 3.
45. *Id.*
46. *Id.* ¶ 4.
47. *Id.* ¶ 5.

cerning the State's maintenance of the floor and ventilation system in the area.[48]

The State, however, failed to grasp any correlation between Plaintiff's discovery requests and Richardson's slip and fall.[49] According to the State's interpretation of the discovery requests, Richardson sought "irrelevant information . . . not reasonably calculated to lead to the discovery of admissible evidence," and the requests "were vague and ambiguous."[50] Satisfied with these explanations, the State determined that four of Richardson's six remaining requests for production warranted a simple "not applicable" response.[51]

Perplexed by the State's inability to correlate requests for information regarding slip and falls and the condition of the area where they occurred with the highly analogous present situation, Richardson sent a letter to the State requesting a more loquacious response.[52] The State again refused to answer, and Richardson filed a Motion to Compel Discovery.[53]

Concurrently, the State filed a Motion for Summary Judgment, arguing that it should not have anticipated Richardson's injury, and a Motion *in Limine*, noting the installation of "grip strips" at the facility in response to another patron's fall shortly before Richardson's.[54] Despite the State's recognition of the relevance of prior falls, the response by the facility to those falls, and the State's propensity to anticipate locker room slip and falls in the State's own motions and briefs, the State continued to cling to its assertion that information regarding other falls was not relevant nor reasonably calculated to lead to the discovery of admissible evidence.[55]

The State did elect, in its Brief Opposing Richardson's Motion to Compel Discovery, to elaborate on its theory of non-discoverability. According to the State, Richardson's requests were rendered too vague and ambiguous due to the use of the term "area" when seeking information about "the area of Plaintiff's fall."[56] Content with this reasoning, the State felt secure in finally con-

48. *Id.*
49. *Richardson*, ¶ 6.
50. *Id.*
51. *Id.*
52. *Id.* ¶ 7.
53. *Id.*
54. *Id.* ¶ 8.
55. *Richardson*, ¶ 8.
56. *Id.* ¶ 9 (emphasis added).

ceding that disclosure of other falls in the women's locker room was appropriate (though actual disclosure still did not occur).[57]

The district court shed some sanity on the situation by characterizing the conflict as a dispute over "little nuances," and concluded that the State had to answer all questions within ten days of service.[58] Although the district court offered to entertain any objections concerning "unanswerable" questions, the State failed to respond to the district court's offer.[59]

Richardson re-served her discovery requests on April 19th, replacing the purportedly vague and ambiguous "area of Plaintiff's fall" with the less prosaic, and ironically more expansive, "women's locker room."[60] Realizing its hyper-technical reading of Plaintiff's discovery requests was a "little nuance" perturbing the district court, the State relented and decided to answer "most" of Richardson's requests on May 7th.[61] Apparently, however, the district court's admonition that all questions be answered was too nuanced for the State, as it again failed to answer Richardson's interrogatory seeking information regarding other falls.[62]

In a bit of déjà vu, Richardson sent another letter to the State seeking answers; again the State responded by continuing to withhold the information, this time filing a motion asking the district court to exclude evidence and argument regarding other falls.[63] The State decided to bolster its exclusion argument by asserting, *inter alia*, that Richardson's expert had not tested the other areas of the locker room floor where other women had fallen.[64] How Richardson's expert could know where other women had fallen given the State's refusal to divulge such information is a divination skill of the Plaintiff left unexplained by the State.

Finally, on May 13th, seven months after Richardson's initial request, two months after discovery closed, and eleven days before trial, the State grasped the relevance of prior falls and responded to Richardson's discovery requests.[65] The State, however, failed to recognize the importance of providing legible copies of the slip and

57. *Id.*
58. *Id.* ¶¶ 10, 11.
59. *Id.*
60. *Id.* ¶ 12.
61. *Richardson*, ¶ 13.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* ¶ 14.

fall incidents,[66] or the importance of accurate descriptions of certain incidents.[67] Dorothy Honeychurch, for instance, slipped and fell on the smooth trowelled concrete floor of the women's locker room less than one month before Richardson's similar accident, but the State reported that Honeychurch "slipped on a rubber mat."[68] Given the State's prior inability to comprehend the relevance of this evidence, however, it is hardly surprising that the State failed to recognize the importance of accuracy on its first try.

A four-day trail ensued where, unsurprisingly, evidence regarding other falls was admitted and discussed at length.[69] The jury concluded, however, that the State was not negligent, and the district court rendered Judgment in the State's favor.[70] Richardson filed a motion requesting, *inter alia*, the district court amend the Judgment by entering a default judgment on the issue of liability against the State as a sanction for its discovery abuse.[71] The district court denied the Motion.[72] The Montana Supreme Court reversed.[73]

Issue: Did the district court err in denying Richardson's Motion to Amend the Judgment and impose a default judgment on the issue of liability based on the State's conduct during discovery?

Exasperated with the State's conception of an appropriate discovery process, Richardson argued on appeal that the State's objections to her discovery requests were not made in good faith; that the State's exploitation of nuances put her at a severe disadvantage; that her counsel and experts were not given adequate time to prepare; and that the State unfairly benefited from its recalcitrance.[74] Accordingly, the State's abuse warranted the imposition of a default judgment on the issue of liability.[75]

The State's fondness for brevity continued in its counterargument. The State asked the Supreme Court to defer to the district

66. *Id.* ¶ 15.
67. *Richardson*, ¶ 15.
68. *Id.*
69. *Id.* ¶ 17.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Richardson*, ¶ 69.
74. *Id.* ¶ 20.
75. *Id.*

court's ruling.[76] It provided no explanation for how its objections to Richardson's discovery requests were proper.[77]

The Supreme Court began by laying some foundation. The "purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith."[78] Discovery assures the "mutual knowledge of all relevant facts," an essential component of proper litigation.[79] Discovery makes a "trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest extent possible."[80]

The State got lost in its pursuit of truth, "improperly conceal[ing] the evidence of other falls until the eve of trial by asserting baseless objections" to "highly relevant and probative" evidence.[81] Not content with mere concealment, the State compounded its improprieties and undermined the integrity of the litigation by "aggressively press[ing] the advantage . . . it gained by its belated exposure, repeatedly exploiting Richardson's lack of knowledge" in its own motions and briefs.[82] The Supreme Court continually returned to this exploitation of advantage by the State, noting that the use of information by the State in its motions and briefs despite its concealment from Richardson was "particularly egregious."[83]

Not only did the State's clandestine tactics skew the pursuit of truth, but they "undermined the chances of settlement."[84] The law "favors compromises" because they relieve the courts' workload, avoid expense, and permit parties to reach mutually agreeable and more equitable and efficient solutions.[85] Obstacles placed in the path of compromise undermine these goals.

The Supreme Court left the loftier notions of truth and compromise for a more mundane examination of the State's compliance with procedural rules. Montana Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant. . .. It is not ground

76. *Id.*
77. *Id.*
78. *Id.* ¶ 22 (citations omitted).
79. *Richardson*, ¶ 22.
80. *Id.* (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)).
81. *Id.* ¶ 23
82. *Id.*
83. *Id.* ¶ 53.
84. *Id.* ¶ 55.
85. *Richardson*, ¶ 55.

for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule of Civil Procedure 33 authorizes the use of interrogatories, and is "liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage."[86]

Not only did the Supreme Court recognize that Richardson's discovery requests seeking information concerning other falls were "clearly relevant," but the State acknowledged in its Motion for Summary Judgment that a primary issue in the case was whether the State should have anticipated Richardson's injury.[87] And, in the "clearest indication" of the impropriety of the State's objections, it included in a brief the installation of "grip strips" in the facility following a fall by another patron shortly before Richardson's fall, unequivocally demonstrating the evidence's relevance.[88] Yet the State continued to withhold such information from Richardson.

Pressing these ironies further, the Supreme Court noted that its decision in *Kissock v. Butte Convalescent Center*,[89] another slip and fall case, clearly demonstrated that information concerning other falls was not only relevant, but potentially admissible at trial. The State's counsel in the present case represented the defendant in *Kissock*, arguing with eerie similarity and equally unsuccessfully, that information regarding other falls was irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.[90]

Unsurprisingly, the State did not (or could not) justify its objection that the evidence was irrelevant.[91]

Even if the State believed, in good faith, that evidence of other falls would not be admitted at trial, the State was not entitled to conceal the evidence from Richardson nor "preempt the District Court's discretion" regarding the admission of the evidence.[92] Montana Rule of Civil Procedure 26(b)(1) confirms that inadmissibility is not a proper ground for objection if the "information

86. *Id.* ¶ 24.
87. *Id.* ¶ 25.
88. *Id.* ¶ 31.
89. 1999 MT 322, 297 Mont. 307, 992 P.2d 1271.
90. *Richardson*, ¶ 27.
91. *Id.* ¶ 32.
92. *Id.* ¶ 29.

sought appears reasonably calculated to lead to the discovery of admissible evidence." "No merit" existed in the State's argument that evidence of other falls was not reasonably calculated to lead to the discovery of admissible evidence.[93]

The State fared no better in justifying its objections to Richardson's request for information concerning protective measures taken to prevent slip and fall injuries, and information regarding any changes made to the floor and ventilation system in the area of Richardson's fall. The State's familiar refrain of irrelevancy was a "plain abuse of the discovery process," and, again, the indefensibility of the State's stance was underscored by its inability to justify its other objections.[94]

After dispensing with these legally cognizable objections, the Supreme Court turned to the State's novel "not applicable" responses. Montana Rule of Civil Procedure 34(b) requires that a party served with a production request either state that it will accommodate the request, or assert an objection with accompanying justification. Not only is "not applicable" not within even a penumbral reading of this rule, but the State violated the district court's Order requiring the State to answer Richardson's request. The State provided no explanation for its extra-procedural objections or refusal to comply with the district court's Order.

Even where the State managed to assert a legally cognizable objection, vague and ambiguous, it did so in a manner that strained the bounds of rationality. Richardson's request for production sought certain information "relating to the area of Plaintiff's fall."[95] According to the State, its objection was based on its "inability to determine whether Richardson intended the word 'area' . . . to be limited to the precise location in the locker room where Richardson allegedly fell, the locker room itself, or whether Richardson sought discovery concerning the entire facility."[96] The Supreme Court "wholeheartedly disagree[d]," characterizing the State's strained interpretation that demonstrated an inability to construe language in context as an insertion of "artificial ambiguity," and "clearly disingenuous" given the State's own interrogatories that sought information regarding the "areas" involved in the accident.[97] According to the Supreme Court:

93. *Id.* ¶ 30.
94. *Id.* ¶¶ 35-37, 40.
95. *Id.* ¶ 48.
96. *Richardson*, ¶ 39.
97. *Id.* ¶ 50.

> When an interrogatory can reasonably be interpreted, in the context of the claims and defenses at issue, as seeking discoverable information, the recipient of the interrogatory must interpret it that way rather than putting some meaning to the request which would render it vague, ambiguous, or objectionable in some other respect. . .Simply put, recipients of discovery requests are not entitled to indulge in such unrealistic interpretation.[98]

Content with its assessment of the State's abusive tactics, the Supreme Court turned to the question of sanctions, beginning with an admonishment: "This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently. . .[and will] remain intent upon punishing transgressors rather than patiently encouraging their cooperation."[99] The "imposition of sanctions for failure to comply with discovery procedures is regarded with favor," and "the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires."[100] This "policy of intolerance" aids in relieving overcrowded dockets, prevents impermissible prejudice to opponents, and facilitates the fair and efficient administration of justice.[101]

The State's actions were analogous to those in *Schuff v. A.T. Klemens & Son*[102] and *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co., Inc.*,[103] which warranted the imposition of default judgment on the issue of liability as a sanction for discovery abuse. The State's actions prevented Richardson from assessing the merits of the State's purported defenses and complicated the construction of her own case-in-chief.[104] Moreover, the State's "belated disclosure prevented Richardson from conducting meaningful follow-up discovery in time for trial."[105]

Seizing on this last point, the State argued that Richardson had failed to seek a continuance. An unsympathetic Supreme Court, however, reminded the State that it was the State's "improper concealment of evidence which directly caused Richardson's predicament;" and the State "will not now be heard to criticize Richardson" for choosing the Scylla of proceeding to trial without an opportunity to fully prepare over the Charybdis of in-

98. *Id.* ¶ 52.
99. *Id.* ¶ 56 (citations omitted).
100. *Id.* (citations and internal quotations omitted).
101. *Id.* ¶ 57.
102. 2000 MT 357, 303 Mont. 274, 16 P.3d 1002.
103. 2005 MT 254, 329 Mont. 38, 122 P.3d 431.
104. *Richardson*, ¶ 59.
105. *Id.*

curring further expense in conducting discovery that could have been achieved earlier with timely disclosure by the State.[106]

Returning to foundational purposes, the Supreme Court reiterated that the purpose of the Montana Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action."[107] A just determination is contingent upon full disclosure, which ensures mutual knowledge of all relevant facts.[108] Achieving a speedy and inexpensive determination is contingent upon timely disclosure.[109] Ultimately, however, these purposes, as recognized in the Preamble to the Montana Rules of Professional Conduct, service the pursuit of truth.[110] This case "is the poster child for how that principle is frustrated by abusive discovery tactics."[111] It is littered with objections lacking merit, hypertechnical arguments, legally untenable assertions, concealment of evidence, strategic exploitation of impermissibly attained advantage, unnecessary waste of litigant and court resources, and effective nullification of the jury's function in the civil justice system.[112] The "only proper sanction is a default judgment on the issue of liability."[113] Anything less "would be inconsistent with the rule that punishment for discovery abuses must be made unbearable in order to thwart the inevitable temptation which zealous advocacy inspires."[114]

Although the Supreme Court recognized that the principle of "trial on the merits" weighs against the imposition of a default judgment," the State's actions "outweighed this principle."[115] Remanding for a new trial would have been too lenient, as "any further delays resulting from the State's discovery abuse would simply be unjust."[116] Thus, the sins of discovery abuse converted a State jury trial success into a Supreme Court imposition of liability upon the State.

Christopher C. Stoneback

106. *Id.* ¶¶ 60, 61.
107. *Id.* ¶ 63 (quoting MONT. R. CIV. P. 1).
108. *Id.*
109. *Id.*
110. *Richardson*, ¶ 64.
111. *Id.*
112. *Id.*
113. *Id.* ¶ 65.
114. *Id.*
115. *Id.* ¶ 68.
116. *Richardson*, ¶ 67.

3. *HALL V. STATE*[117]

In *Hall v. State*, the Montana Supreme Court addressed an appeal from two retired city firefighters who challenged the dismissal of their complaints against the State of Montana and the Public Employees' Retirement Board (PERB) for missing a statute of limitations.

Earl Hall and Ronald Hansen were both retired firefighters, Hall formerly working for the City of Missoula and Hansen a former firefighter in Anaconda.[118] Each man had contributed to the Montana Firefighters' Unified Retirement System (FURS) during their respective employments and were both fully vested members at the time of their retirement.[119] FURS is a public pension plan available for firefighters employed by cities wishing to adopt the plan.[120] Membership in this program is mandatory for all full-time firefighters employed by cities providing FURS coverage.[121] Under the FURS plan, employers must file an "Employer Report" to the Montana Public Employee Retirement Administration (MPERA) within five days of each regular payday that shows compensation amounts for each employee.[122] The PERB uses the information from these reports to determine the amount of "contributions" made by the employee and the employer to each employee's FURS fund.[123]

On October 13, 2004, Hall and Hansen filed a complaint against the State and the PERB alleging incorrect compensation calculations relating to each man's retirement account.[124] Specifically, the plaintiffs claimed the two entities had failed to include health insurance premiums paid by their employers as part of their "compensation," which was to be included in the calculation of their retirement benefits.[125] The two men claimed that these errors were made state-wide, with the exception of firefighters in Bozeman, and therefore requested an order certifying their right to bring a class action suit on behalf of all affected Montana firefighters.[126]

117. 2006 MT 37, 331 Mont. 171, 130 P.3d 601.
118. *Id.* ¶ 3.
119. *Id.*
120. *Id.* ¶ 13 (citing MONT. CODE ANN. § 19-13-210 (2005)).
121. *Id.* ¶ 14.
122. *Id.* ¶ 15 (citing MONT. CODE ANN. § 19-2-506 (2005)).
123. *Hall*, ¶ 17.
124. *Id.* ¶ 4.
125. *Id.* ¶ 5.
126. *Id.*

In its answer to Hall and Hansen's complaint, the PERB and the State filed motions to dismiss for failure to state a claim for which relief is available.[127] The defendants cited as their primary defense that the two year statue of limitations had run on the plaintiffs' claims.[128] The defendants also argued that they were not the proper defendant for the claims made by the plaintiffs.[129] The PERB alone argued, as a third justification for the motion, that the plaintiffs had failed to exhaust their remedies by failing to join their respective employers as necessary defendants in the action.[130]

The district court granted both defendants' motions to dismiss based on their statue of limitations defense.[131] It did, however, agree to convert the motions to dismiss to motions for summary judgment if the plaintiffs wanted to contest their retirement dates, but neither plaintiff desired such a conversion.[132]

On appeal to the Montana Supreme Court, Hall and Hansen argued that the "installment rule" applied to their claims, and that with each incorrect monthly benefit payment, the statute of limitations began anew.[133] The Montana Supreme Court did not consider this claim because it found that the statute of limitations was not the controlling issue in the case. The Montana Supreme Court instead found that the State and the PERB were not the correct defendants in the case.[134] It justified this decision on a plain language statutory analysis.

The plaintiffs were claiming that Montana Code Annotated section 19-2-403(5) and (6) stood for the proposition that the PERB was responsible for determining "compensation" amounts and it was therefore the Board's fault for miscalculating their retirement benefits.[135] The Court found this argument flawed because in the code section cited by the plaintiffs there was no provision imposing responsibility for calculating the amount of each member's compensation on the Board or the State.[136] Instead, the Court cited Montana Code Annotated section 19-2-506, which im-

127. MONT. R. CIV. P. 12(b)(6).
128. *Hall*, ¶ 6.
129. *Id.* ¶ 7.
130. *Id.* ¶ 8.
131. *Id.* ¶ 9.
132. *Id.*
133. *Id.* ¶ 12.
134. *Hall*, ¶ 12.
135. *Id.* ¶ 18 (citing MONT. CODE ANN. § 19-2-403(5) & (6)).
136. *Id.* ¶ 19.

poses such a responsibility on the employer to submit this compensation information to MPERA.[137] Under section 19-2-403(5) and (6), the Board's only duty is to determine and modify the benefits payable to employees, not the compensation amounts.[138]

Although the Court did not find the statute of limitations claim to be controlling, it still affirmed the trial court's order of dismissal, but on different grounds.[139] The Court found that the plaintiffs should have sought relief against their respective employers because it was the employer's duty to calculate their compensation amounts.[140]

Hall v. State is a classic case of basic statutory interpretation. The Montana Supreme Court applied a plain language statutory analysis to determine whom the duty to calculate compensation amounts was imposed on. The Court's decision should alert Montana legal practitioners to the importance of thoroughly reading statutory language and looking to the plain meaning conveyed by the legislature when it drafted the statute controlling a practitioner's case.

Brad J. Brown

4. *HERN V. SAFECO INS. CO. OF ILLINOIS*[141]

In June 1992, Ardell and Robert Herns' adult child, Becky, was killed in a motorcycle accident.[142] The motorcycle was driven by Becky's uninsured fiancée, though Becky was insured by American Economy Insurance Company at the time.[143] Becky was living with her parents when she was killed, and in March 1993, the Herns settled with their insurer, Safeco, based on Safeco's position that the multi-car policy purchased by the Herns could not be stacked.[144] The Herns and Safeco settled for $500,000 – the coverage provided in the policy; if the policy had allowed stacking, the maximum coverage would have been $2 million for the Herns' four vehicles.[145]

137. *Id.* (citing MONT. CODE ANN. § 19-2-506 (2005)).
138. *Id.*
139. *Id.* ¶ 21.
140. *Hall*, ¶ 20.
141. 2005 MT 301, 329 Mont. 347, 125 P.2d 597.
142. *Id.* ¶ 8.
143. *Id.*
144. *Id.* ¶¶ 8-9.
145. *Id.* ¶ 9.

In 1997, a separate class action was brought by Safeco's insureds, alleging "that Safeco charged them multiple premiums for providing [underinsured motorist] coverage on multiple vehicles but had no intention of providing coverage beyond that afforded to a single vehicle."[146] The "Seltzer Settlement" was entered into in 2001 as a result of that class action, and allowed a Safeco insured who purchased coverage for multiple cars, but whose claims were negotiated prior to the settlement under the assumption that the coverages could not be stacked, to have their claims reopened and readjusted.[147] The Herns submitted a claim for readjustment ten years after entering into their original settlement.[148]

Safeco denied the claim, and pursuant to the terms of the Seltzer Settlement, the Herns filed an action seeking full recovery of their damages.[149] The district court granted the Herns' motion for summary judgment,[150] and a jury then determined the Herns' damages totaled over $3.8 million, based in large part on Becky's lost earning capacity, pain and suffering, and loss of established course of life, as well as for the Herns' loss of consortium and emotional distress.[151]

The district court reduced the award to $2 million – the value of the Herns' four stacked uninsured motorist policies.[152] The court then subtracted the amount of the Herns' earlier settlement from the $2 million, and awarded 10% interest per year from the date the claim was originally adjusted pursuant to the Seltzer Settlement terms.[153] The court added $2.08 million in interest to the adjusted award amount, and ordered Safeco to pay the Herns in excess of $3.9 million.[154]

Safeco appealed to the Montana Supreme Court on a number of issues, not all of which are discussed herein. The first issue to be discussed is whether the district court erred in instructing the jury to award compensation for the loss of Becky's ability to pursue an established course of life. The second and third issues to be discussed were whether the district court erred in awarding damages to both of Becky's parents for loss of consortium.

146. *Id.* ¶ 10.
147. *Hern*, ¶ 11.
148. *Id.* ¶ 13.
149. *Id.*
150. *Id.* ¶ 14.
151. *Id.* ¶ 15.
152. *Id.* ¶ 16.
153. *Hern*, ¶ 16.
154. *Id.*

One of Safeco's strongest arguments on appeal was that the district court abused its discretion by giving a jury instruction permitting the jury to award Becky's estate for loss of an established course of life. Safeco argued "Montana law does not allow these damages in a survival action because they are not damages suffered by Becky Hern."[155] Safeco maintained that, though damages for lost ability to pursue an established course of life are available in a personal injury or wrongful death action, they are not available in a survival action.[156] The Herns countered that, because damages recoverable in a survival action are identical to those in a personal injury action, the jury instruction was proper.[157] The Montana Supreme Court agreed with Safeco.

According to the Court, loss of established course of life damages are "unique to Montana" and have historically been confined to personal injury actions.[158] The Court observed that in a personal injury action, loss of established course of life damages compensate the injured plaintiff for the "loss of what she once had, and the accompanying realization that she will live the rest of her life without ever recovering her previous course of life."[159] In contrast, the nature of a survival action precludes the decedent from suffering such a loss. Therefore, it was error for the district court to allow the jury to award loss of established course of life damages.[160]

Five-hundred thousand dollars of the $2 million awarded to the Herns was for Robert Hern's loss of society, comfort, care, and companionship and for his grief, sorrow, and mental anguish.[161] Safeco maintained on appeal that Montana law does not recognize a parent's claim for loss of consortium for the death of an adult child. Safeco also argued that Mr. Hern was not entitled to compensation for loss of consortium because only Becky's personal representative could pursue such wrongful death damages.[162] According to the Court, Montana's Wrongful Death statute[163] has "been interpreted to mean that only one wrongful death action arising out of a wrongful death may be brought and the decedent's

155. *Id.* ¶ 31.
156. *Id.*
157. *Id.* ¶ 32.
158. *Id.* ¶ 38.
159. *Hern*, ¶ 39.
160. *Id.* ¶ 39.
161. *Id.* ¶ 15.
162. *Id.* ¶ 45.
163. MONT. CODE ANN. § 27-1-513 (2005).

personal representative is the only person who may bring such an action."[164] Mr. Hern was not the personal representative of Becky's estate, so the Montana Supreme Court vacated the $500,000 awarded to him.[165]

Becky's mother, Ardell, was awarded $750,000 for her loss of society, comfort, care, and companionship and for her grief, sorrow, and mental anguish.[166] Safeco argued this award was also erroneous, while Mrs. Hern maintained that section 27-1-323 of the Montana Code Annotated recognizes loss of consortium as one of many compensable damages for the loss of an adult child.[167] The Montana Supreme Court turned to the U.S. District Court for the District of Montana's interpretation of Montana law to resolve this issue. In *Bear Medicine v. United States*, the U.S. District Court observed:

> Montana allows loss of consortium claims by a husband or wife whose spouse has been killed or injured. Montana also allows loss of consortium claims by a minor child or a parent whose minor child or parent has been killed or injured. Allowing a loss of consortium claim for parents of adult children only furthers this development of the common law and is consistent with the purposes of the law recognized by the legislature of the State of Montana as interpreted by the Montana Supreme Court.[168]

The Montana Supreme Court agreed with the federal court that "under certain circumstances. . .the bond between parents and an adult child, and the loss experienced by the parents at the death of, or serious injury to, their child, may be of such quality as to warrant recovery by the parents for loss of consortium."[169] The Court concluded, however, that "significant evidence of an extraordinarily close relationship must be presented before a court may consider awarding loss of consortium damages to the parents of an adult child."[170]

The Court reviewed evidence of the relationship between Becky and her parents and determined that the *Bear Medicine* standard was not met.[171] Specifically, Becky had not contributed financial support to her parents, did not manage property or holdings on their behalf, and did not perform a unique role in the fam-

164. *Hern*, ¶ 46.
165. *Id.* ¶ 47.
166. *Id.* ¶ 15.
167. *Id.* ¶¶ 48-49.
168. 192 F.Supp.2d 1053, 1067 (D. Mont. 2002).
169. *Hern*, ¶ 58.
170. *Id.*
171. *Id.* ¶ 61.

ily's spiritual traditions, all of which were present in *Bear Medicine*.[172] Therefore, the Court vacated the award of $300,000 in damages awarded for Mrs. Hern's loss of consortium (phrased as "loss of society, comfort, care and companionship" in the jury instructions).[173] On the other hand, the Court affirmed the jury's award of $450,000 to Mrs. Hern (as personal representative of Becky's estate) for grief, sorrow, and mental anguish, because "[i]t is well established that a jury may award 'reasonable compensation for grief, sorrow and mental anguish' in wrongful death actions."[174]

Jeffrey T. Dickson

5. *MAUPIN V. MEADOW PARK MANOR*[175]

The venue rules that apply to general partnerships also apply to limited liability partnerships.[176] Thus, a suit against a limited liability partnership is proper in any county where a general or limited partner resides.[177]

On February 18, 2004, Vera Maupin ("Maupin") slipped and fell in front of her apartment, which was located in Richland County.[178] Meadow Park Manor ("Meadow Park"), a limited liability partnership, owned the apartment building, and a partner in Meadow Park resided in Cascade County.[179] On November 15, 2004, Maupin filed a complaint in the Eighth Judicial District, Cascade County.[180]

Meadow Park subsequently moved for a change of venue, contending the residency of a limited partner in Cascade County did not create a proper basis for venue under Montana Code Annotated section 25-2-122.[181] In rebuttal, Maupin maintained that Meadow Park owned the building as a general partnership because the property deeds did not refer to Meadow Park's LLP sta-

172. *Id.*
173. *Id.*
174. *Id.* ¶ 62 (citations omitted).
175. Maupin v. Meadow Park Manor, 2005 MT 304, 329 Mont. 413, 125 P.3d 611.
176. *Id.* ¶ 6.
177. *Id.* ¶ 8.
178. *Id.* ¶ 3.
179. *Id.*
180. *Id.* ¶ 4.
181. *Maupin*, ¶ 4.

tus.[182] On January 24, 2005, the district court granted Meadow Park's motion for a change of venue.[183]

On appeal, Maupin argued that although Meadow Park owned the apartment as an LLP, Title 35, Chapter 10, of the Montana Code Annotated does not alter the venue rules from that of a general partnership.[184] Meadow Park offered two justifications for upholding the district court's ruling. First, Meadow Park claimed its only Cascade County resident, Ms. Dorr, could not be held personally liable for Maupin's injuries and thus none of the venue requirements could be met.[185] Alternatively, Meadow Park argued the legislature intended limited liability partnerships be treated as corporations for the purposes of venue.[186] In deciding whether a plaintiff may properly bring a tort action against a limited liability partnership in a venue where a limited partner resides, the Montana Supreme Court answered in the affirmative, reversing the district court.[187]

A tort action may be filed in any county in which a defendant resides at the commencement of an action.[188] In addition, a partnership resides where any of its partners reside for the purposes of venue.[189] Title 35, Chapters 10 and 12, of the Montana Code Annotated draw no distinction between limited liability and general partnerships for the purposes of venue.[190] Rather, Montana Code Annotated section 35-10-702 states a limited liability partnership is for all purposes "the same entity that existed before the registration."[191] For purposes of venue, Montana law treats a limited liability partnership no different than a general partnership.[192] The "all purposes" language in Montana Code Annotated section 35-10-702 implies such equal treatment.[193] Accordingly, the Court determined venue is proper for an action against a limited liability partnership if a partner resides in the county in which the plaintiff commences the suit.[194] Furthermore, Justice

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* ¶ 12 (Warner, J., concurring).
186. *Id.* ¶ 7 (majority opinion).
187. *Maupin*, ¶¶ 1-2.
188. *Id.* ¶ 8 (citing MONT. CODE ANN. § 25-2-122(1) (2005)).
189. *Id.*
190. *Id.* ¶ 7.
191. *Id.*
192. *Id.* ¶ 6.
193. *Maupin*, ¶ 7.
194. *Id.* ¶ 8.

Morris declined Meadow Park's invitation to read into the limited liability statutes a legislative intent to modify venue rules for limited liability partnerships.[195] The Court's role, he determined, was to ascertain and declare the substance contained within the statute, not to insert language where it was omitted by the legislature.[196]

Jason A. Johns

6. *Stipe v. First Interstate Bank of Polson.*[197]

In December 2002, Vernon, Marvin, and Douglass Stipe ("the Stipes") filed an action in the Twentieth Judicial District Court of Montana alleging First Interstate Bank of Polson ("FIB") maliciously foreclosed a security interest on some of the Stipes' ranch property and intentionally inflicted emotional distress upon them.[198] During the course of its factual investigation into the Stipes' claim, FIB's counsel met with a potential witness, Lisa Stipe.[199] Ms. Stipe was in the middle of divorce proceedings with Marvin Stipe, and upon learning of the meeting between FIB's counsel and Ms. Stipe, all of the Stipes refused to attend their scheduled depositions.[200] The Stipes filed a motion for a protective order, attempting to invoke the spousal privilege and seeking to bar FIB from further communications with Ms. Stipe.[201] FIB opposed the motion and sought to compel discovery. FIB also sought an award of its costs and attorneys' fees for being forced to secure a court order to compel the Stipes' depositions and for costs associated with the Stipes' failure to attend their depositions.[202] The district court held there was no violation of the spousal privilege by FIB's counsel and ordered the parties to immediately proceed with discovery.[203]

Less than six days after the district court's order, FIB filed notices of depositions for the Stipes.[204] On the same day, the Stipes moved for an injunction halting discovery, and sought removal

195. *Id.* ¶ 7
196. *Id.*
197. 2005 MT 295, 329 Mont. 320, 125 P.3d 591.
198. *Id.* ¶ 6.
199. *Id.* ¶ 7.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Stipe*, ¶ 8.
204. *Id.* ¶ 9.

of FIB's counsel for violating the spousal privilege.[205] The Stipes' motion was based on the same meeting between Ms. Stipe and FIB's counsel that the district court had already ruled was not a violation of the spousal privilege.[206] The district court denied the injunction and requested FIB's counsel submit an affidavit stating the attorneys' fees incurred in responding to the motion. FIB's counsel submitted the affidavit, listing $11,741 in attorneys' fees, but the court waited to award the fees to see if the litigation progressed.

Once again, none of the Stipes attended their depositions.[207] The district court then entered a written order awarding FIB attorneys' fees and costs for the Stipes' abuse of the discovery process.[208] "Specifically, the district court found that the Stipes attempted to take a second run at issues previously determined by the district court and that they repeatedly, unilaterally and improperly refused to attend properly noticed depositions."[209] It was apparent to the district court that "the entire basis of Stipes' petition for an injunction was the conversation between FIB's counsel and Marvin Stipe's estranged wife, which it had already determined did not violate the spousal privilege."[210] The district court found the Stipes' filing of the petition for injunctive relief and refusal to attend properly noticed depositions unjustified, and awarded fees and costs to FIB's counsel.[211]

The Montana Supreme Court approved of the district court's actions. According to the majority, the district court "justifiably found that [the Stipes'] conduct caused FIB to incur unnecessary expense in relitigating issues and in preparing for depositions that Stipes refused to attend."[212] The Stipes' misconduct was a "more than adequate" reason to impose sanctions, according to the Court.[213]

Justice Nelson dissented from the majority, correctly noting that "[b]efore imposing a Rule 11 sanction, the court must, *sua sponte*, notice up a due process hearing and enter findings sup-

205. *Id.*
206. *Id.*
207. *Id.* ¶ 10.
208. *Id.* ¶ 11.
209. *Stipe*, ¶ 29.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

porting the imposition of the sanction."[214] No such hearing was held, however, because the district court found – and the Montana Supreme Court majority agreed – the Stipes had waived their right to an evidentiary hearing when they withdrew their objection to the imposition of attorneys' fees and stipulated to the reasonableness of the amount.[215] The majority held that, where counsel withdraws an objection to the award of attorneys' fees as a sanction for misconduct, no evidentiary hearing is necessary. Justice Nelson's dissent was based on clear and unequivocal language from the Court's holding in *Lindey's v. Goodover*,[216] in which the Court stated: "Although Montana's Rule 11 does not state that a trial court must give notice to show cause and hold a hearing before imposing Rule 11 sanctions, we hold that a trial court must do so in order to provide the party with due process."[217]

Justice Nelson dissented because "the District Court did not notice up a Rule 11 hearing or hold a hearing to make the requisite findings prior to imposing the sanction."[218] Justice Nelson pointed out that imposing sanctions and determining the reasonableness of those sanctions are discrete legal issues requiring different proof and involving different considerations.[219] The importance of an evidentiary hearing is to determine "whether counsel did or did not, as a matter of fact, engage in conduct which was interposed for an improper purpose such as harassment, causing unnecessary delay or needless increase in the litigation."[220] In addition, the evidentiary hearing may involve testimony as to the reasonableness of the fees incurred by the party opposing the objectionable conduct, and possibly third-party expert testimony as to the going rate of attorney fees under comparable circumstances.[221] Justice Nelson disagreed that the Stipes waived their right to an evidentiary hearing, and dissented because no such hearing was held.[222]

Jeffrey T. Dickson

214. *Id.* ¶ 33.
215. *Stipe*, ¶¶ 21, 25, 26.
216. 264 Mont. 489, 872 P.2d 767 (1994).
217. *Id.* at 497, 872 P.2d at 772.
218. *Stipe*, ¶ 36.
219. *Id.* ¶ 37.
220. *Id.* ¶ 38.
221. *Id.* ¶¶ 38-39.
222. *Id.* ¶ 40.